

EXHIBIT C

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

GREAT LAKES HOME HEALTH SERVICES,
d/b/a ELARA CARING

Plaintiff,

vs.

File No. 20-154-CB

BRANDI VANDEUSEN, CARELINE HEALTH
GROUP Michigan, CARELINE PALLIATIVE
CARELINE HOLDCO, LLC.

Defendant.

CROSS-MOTIONS

BEFORE THE HONORABLE JOYCE DRAGANCHUK, CIRCUIT COURT JUDGE
LANSING, MICHIGAN - WEDNESDAY, JULY 14, 2020

APPEARANCES:

For the Plaintiff:

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For the Defendant:

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1 Appeals case nearly dead on point that says these referral
2 sources are not a protectable business interest.

3 THE COURT: Okay.

4 MR. BEER: And so, I'm not inclined to give a lot
5 of credence to that Florida case and I would suggest your
6 Honor should not either.

7 THE COURT: All right. Thank you.

8 MR. BEER: Thank you.

9 THE COURT: Well, first, a little background.
10 There are four counts in the complaint. Count one is
11 breach of contract. It's based on an employment agreement
12 and a confidentiality and Non-Compete Agreement. They are
13 dated the same day. And under those agreements, there are
14 Non-solicitation and Non-Compete provision. Count two is
15 for tortious interference, which is brought against the
16 Careline Health Group only. Count three is for unjust
17 enrichment and Count four is for civil conspiracy brought
18 against all the defendants.

19 The bulk of these cross-motions deal with the
20 breach of contract claim and specifically the Non-
21 solicitation and the Non-Compete provision. So, I'll start
22 there.

23 First of all, plaintiff requests summary
24 disposition with regard to the Non-solicitation clause of
25 the contract. The Non-solicitation provision provides

1 “during the term of this agreement and following
2 employees voluntary or involuntary termination from
3 employment with Great Lakes, employee agrees that she
4 shall not directly or indirectly either individually or on
5 behalf of or in conjunction with another person,
6 organization or company contact or solicit any Great Lakes
7 client including but not limited to referral source
8 patient, patient-advocate or family member or any other
9 source of Great Lakes business or business referral for
10 the purpose of soliciting the Great Lakes client to do
11 business with anyone other than Great Lakes. For purposes
12 of this subsection, Great Lakes client shall include a
13 Great Lakes client at the time of the termination of
14 employee.” That’s the end of the quote from the contract.

15 So, at least in the briefing, the plaintiff is
16 exactly right in pointing out that the Non-solicitation
17 clause is a prohibition on Ms. Van Deusen’s conduct
18 regardless of whether she’s working for a competitor or
19 not. And the analysis of whether Careline Health Group,
20 which provides hospice care and Careline Physician
21 Services, which does not, are competitors is just not
22 applicable to the Non-solicitation clause based on the
23 language of the contract, which is where we always start.

24 The plaintiff on this issue of Non-solicitation
25 points to Ms. Van Deusen’s own deposition where she

1 acknowledges that she brought Careline Hospice personnel
2 including the Careline Group CEO Joe Mead to meet with the
3 referral sources so they could solicit hospital hospice
4 referrals. And that in some cases, she brought the hospice
5 representatives to meet with the same people that she had
6 solicited for hospice in the past. She also said in her
7 deposition that the hospice representatives who went to
8 these meetings went to obtain business for Careline
9 Hospice and that hospice referrals were sometimes
10 generated at the meeting and that she, Ms. Van Deusen,
11 facilitated these meetings in that she made sure the key
12 decision makers were present and either explicitly or
13 implicitly vouch for the hospice provider. The defendants
14 point to other testimony and argue that Ms. Van Deusen did
15 not sell any hospice care at the meetings and always
16 deferred to the hospice representative if the referral
17 source had any questions about hospice and that the, these
18 meetings did not happen extremely frequently.

19 Here on this matter, the issue of whether, I'm
20 sorry-, what, what here the issue that's been presented is
21 I believe a disputed issue of fact. Whether Ms. Van
22 Deusen was actually working in conjunction with the
23 hospice representative to, to get a hospice referral is an
24 issue that the jury has to decide. There is as I've
25 indicated evidence brought forth on each side from the

1 plaintiffs evidence and the plaintiff even puts it this
2 way, that it's sort of like a 'wink, wink' situation when
3 she goes to the referral source with the hospice
4 representative. In order to make that inference, a finder
5 of fact would have to make that inference and decide
6 whether they were actually working in conjunction with
7 each other., the language in the contract does prohibit
8 working in conjunction with each other. And, and the
9 defendant also their, their testimony that they point to
10 is that they, the hospice representative again and Ms. Van
11 Deusen remain separate and did not each participate in
12 the--, Ms. Van Deusen did not participate directly in the
13 selling of hospice care. And for those reasons, I think
14 that a jury has to decide that. So, there is a disputed
15 issue of fact with respect to the Non-solicitation clause
16 of the contract.

17 The plaintiff also request summary disposition
18 with respect to the Non-Compete clause in the contract.
19 And the defendants request summary disposition in their
20 favor because the defendants position is that the Non-
21 Compete is just not enforceable because it's an
22 unreasonable restraint on trade. Here the issue of whether
23 Elara and Careline Physician Services are competitors is
24 relevant because the Non-Compete provision provides

25 "during the term of this agreement and for two

1 years following employees voluntary or involuntary
2 termination from employment with Great Lakes, Employee
3 agrees that she shall not directly or indirectly in either
4 individually or on behalf of or in conjunction with
5 another person, organization or company engage in any self
6 employment, employment with any other entity, work as a
7 consultant or independent contractor or have full or
8 partial ownership of any entity that provides or consults
9 in providing home health care or hospice care within Great
10 Lakes market area. Great Lakes market area shall be
11 defined as those counties in which Great Lakes has
12 received Medicare certification at the time of employee's
13 voluntary or involuntary separation from Great Lakes."

14 Defendants maintain that Careline Physician
15 Services does not provide any hospice and it's not
16 licensed to provide hospice care. So, it doesn't fall
17 within the language of the contract and Ms. Van Deusen
18 isn't violating the contract by working solely for
19 Careline Physician Services. I think it is indisputable
20 that Careline Physician Services doesn't provide hospice
21 care. But, the plaintiff points to two reasons that Ms.
22 Van Deusen is in violation of the Non-Compete. First, the
23 contract says that she may not engage in the activity
24 either individual or in conjunction with another company
25 and second, the corporate structure is such that there is

1 no appreciable difference between working for Careline
2 Physician Services and Careline Health Group. I'm gonna
3 take a stab at describing what this, what I see is a
4 factual dispute is about. It's a little complicated but,
5 DEM Holding Group owned by Joseph Mead owns Careline
6 Holdco. Careline Holdco has a subsidiary, I'm sorry-,
7 Careline Holdco I wanted to go in a different direction,
8 owns Careline Health Group. It's Careline Health Group
9 that provides the hospice care and that I think is
10 indisputably a competitor of the plaintiff.

11 But, Careline Holdco has a subsidiary CPC
12 Operating. Joseph Mead is the CEO of that subsidiary. They
13 provide management services to Careline Palliative Care.
14 And doing business as Careline Physician Services, Dr.
15 Kielhorn runs that operation. He's referred to as the
16 owner. He's treated as an employee and actually, Careline
17 Palliative Care pays management fees to CPC Operating for
18 their management services and CPC Operating pays the
19 employee Dr. Kielhorn out of those management fees as the
20 employee of CPC Operating. And it's that Careline
21 Physician Services, Dr. Kielhorn for which Ms. Van Deusen
22 works.

23 So, I hope that I got that right. But, I think
24 that that illustrates the factual dispute here whether Ms.
25 Van Deusen worked in conjunction with another company or

1 whether the corporate structure is such that there's no
2 difference between the two, either one of those theories I
3 think are both factual disputes for the jury.

4 So, in other words, the plaintiffs version that
5 Ms. Van Deusen accompanied hospice providers from Careline
6 Health Group when meeting with referral sources
7 constitutes again that 'wink, wink' kind of arrangement.
8 Versus the defendants version that Ms. Van Deusen and a
9 hospice provider went there together. But, Ms. Van Deusen
10 offered no information about hospice services and always
11 deferred to the hospice provider are just competing
12 versions of the facts. And I can't accept either one as
13 true without fact finding and that's particularly true
14 since just to accept plaintiffs version, an inference has
15 to be made that there's some kind of a 'wink, wink'
16 understanding. And, and second theory about the corporate
17 structure, I think also takes a fact finder to resolve
18 whether in fact there is no appreciable difference between
19 the two providers and whether they acted as one.

20 I will say and maybe I shouldn't say this, but I
21 don't think piercing the corporate veil is the correct
22 framework for that. Piercing the corporate veil allows the
23 corporate protection to fall away and liability to attach
24 to an individual or I suppose, it could be another
25 company. But, it's a method of attaching liability. It

1 has to be plead in some form and it's a path to liability.
2 It does require a fraudulent or improper purpose. Here, I
3 think, I just see it as a factual dispute about whether
4 Ms. Van Deusen was de facto acting for Careline Health
5 Group. But, if the plaintiff wants to prove something more
6 difficult than that, then you know, go at it. But,
7 there's a factual dispute either way. So, I would not
8 grant summary disposition in that regard.

9 Now, the defendants say that the Non-Compete is
10 overbroad and it's unenforceable because referral sources
11 are not a protectable interest. They're not confidential
12 and that Ms. Van Deusen is being prohibited from using her
13 own general knowledge and skill. This does not involve a
14 factual dispute because a jury doesn't decide this. It's
15 a matter for the Court to decide and to assess whether or
16 not the Non-Compete either standing by itself or narrowed
17 complies with MCL 445.774(a)(1). And in this regard, both
18 sides and I would add too, normally, the Court does it at
19 the outset of the case when injunctive relief is being
20 sought as to the Non-Compete. But, that wasn't done here
21 and so, I'm doing it rather late in the game.

22 But, nevertheless, the Court has the ability to
23 say it, it stands, it's enforceable, it falls, it is not
24 or it is something in between and it can be modified and
25 tailored to narrow it and make it enforceable. So, both

1 sides agree there's no published authority in Michigan
2 that addresses referral sources as legitimate protectable
3 business interest. But, we do have a couple cases to work
4 with and as far as Michigan cases go. They're at least
5 helpful for either what they do show or what they don't
6 show and how they are distinguished.

7 So, the first one is the Follmer case, F-O-L-L-
8 M-E-R. And that's the Michigan Supreme Court case from
9 1984 that I think both sides have cited perhaps. And I
10 want to talk about this case because I think it
11 illustrates only that exploiting confidential information
12 is not necessary in order to have an enforceable Non-
13 Compete. But, it can be part of an enforceable Non-
14 Compete. So, in Follmer, the employee had a contract that
15 required the employee to pay his employer for the goodwill
16 or the business in respect to a client or a customer if
17 the employee rendered services to that client or customer
18 within three years of termination of employment. And the
19 Court held that the contract was not an unreasonable
20 restraint of trade because it protected confidential
21 information including information regarding customers.

22 And the matter was remanded for determination of
23 whether the employee actually had access to confidential
24 information that provided him with an unusual opportunity
25 to as they put it 'obtain the patronage of particular

1 clients of his former employer.' So, the Supreme Court in
2 that case used access to confidential information as a
3 means to limit what would otherwise be a very broad
4 restraint. Because the restraint didn't limit it to
5 confidential information. But, that's how they limited it
6 and they explained it rather well and this is in Footnote
7 15,

8 "a party who develops or possesses confidential
9 information or trade secrets", which are not at issue
10 here, " belonging to his employer should not be allowed
11 to--, should not be allowed complete freedom to terminate
12 his association and then use this very knowledge to
13 undercut the employer who had taken him into his
14 confidence. This conduct which amounts to a virtual stab
15 in the back gives a competitor an unfair advantage and is
16 inconsistent with our principles of fair play."

17 And of course, they're citing another federal
18 case but that's what they say in footnote 15. But, I think
19 we've learned too that access to confidential information
20 is not the only way that a Non-Compete can be enforced.
21 And that takes me to the case that we've called either
22 Bartlett, B-A-R-T-L-E-T-T, or Northern Michigan Title.
23 That's the unpublished Court of Appeals case from 2005.
24 This was a Non-Compete clause that prohibited the employee
25 from engaging in the title insurance business in

1 Charlevoix County for a period of 5 years after
2 termination. And that was unenforceable because it
3 completely prohibited the employee from engaging in the
4 title insurance business which amounted to just a
5 restraint on the competition.

6 But, here's what the Court of Appeals had to say
7 about the Non-Compete. Maybe I got something a little
8 different out of this than the attorneys. But, this is
9 what I read that they found as their criticism with this
10 very broad, no work in the title insurance business for
11 five years, this very broad Non-Compete. They say, first
12 of all,

13 "the employee would not be permitted to obtain
14 referrals from sources that never had a relationship with
15 plaintiff. The employee would never be able to offer title
16 insurance services to clients who never had or never would
17 have given business to plaintiff in the first place.
18 There are seldom repeat clients in the title insurance
19 business and business is developed through referral
20 sources of which there are many and which are readily
21 identified in the community."

22 So, while the Follmer Court used confidential
23 information as their way of validating Non-Compete, the,
24 the Bartlett case or the Northern Michigan Title case
25 didn't use confidential information, they looked at these

1 other factors. And as a matter fact, they said that the
2 confidential information is a claim that stands alone. So,
3 they didn't even take that into account the way the
4 Follmer Court did.

5 But, in any event, I think those, those factors
6 that the Northern Michigan Title case pointed to are
7 valuable. And so, from those cases, Follmer and the
8 Northern Michigan Title case, I take the following
9 referral sources need not be confidential in order to
10 enforce the Non-Compete. And I think In this case, they
11 aren't. I'll talk about that maybe in a minute. But, there
12 is other confidential information that go along with the
13 referral sources in this case that I think is at issue
14 here.

15 Unlike Bartlett, the Non-Compete or unlike
16 Northern Michigan Title, the Non-Compete here is limited
17 to hospice care and to hospice care in the Great Lakes
18 market area, which is the counties in which Great Lakes
19 have received Medicare certification at the time of Ms.
20 Van Deusen's separation. So, it's distinguishable from one
21 of the factors in Barlett for that reason.

22 Also, and this is an important one, there may
23 not be repeat clients in hospice care. But, there most
24 certainly are repeat referrals sources. And this was
25 described in the deposition testimony. It was described in

1 deposition testimony as facilities having not only
2 preferred providers, providers that they would go to again
3 and again and again. But, in some cases, even exclusive
4 providers. So, one single provider that that facility
5 would always go to as a referral for their patient as a
6 provider for their patient. So, developing a referral
7 source in this case has potentially long-lasting rewards
8 and the plaintiff does in fact compete to achieve that.

9 Now, there was a lot of argument in the briefing
10 about whether referral sources are confidential or not. I,
11 I reviewed all of the deposition testimony that both sides
12 pointed to and even the testimony that the plaintiff
13 pointed to and I just don't think it supports that just a
14 referral source by itself is confidential. It was
15 explained by various different witnesses as you walk in
16 the door of a facility and you ask to talk to someone that
17 would be relevant to what you are there for and they give
18 you someone and maybe then you work through it a little
19 bit from there and get to higher levels of management. So,
20 yes, can you open up a phonebook and see for a facility
21 who it is you need to talk to? No. But, is it a secret?
22 No. You just go to the facility and you start asking
23 questions and that's how it was described. But, it was
24 also described in the testimony that developing a referral
25 source and getting that coveted spot of a preferred

1 provider or even an exclusive provider, it has, it
2 involves much, much more than just walking in the door and
3 trying to drill down on who it is you need to talk to.

4 And one of the ways that it's done is well,
5 developing the relationship and working that source and
6 doing it repeatedly. And, and I get, I think even if we
7 got to that point, it could be argued that that's Ms. Van
8 Deusen's talent and her skill no doubt as an excellent
9 salesperson. But, there's even more to it than that
10 because there was an exchange of company information where
11 Ms. Van Deusen obtained information from other account
12 executives even about the referral sources, what works,
13 what doesn't and what strategies can be undertaken to
14 improve business? So, that's much different than the
15 Northern, the Northern Michigan Title case. And having
16 acquired the information and having built relationships
17 with referral sources that grow into preferred provider or
18 even exclusive provider status using the resources that
19 were available through the plaintiff makes the Non-Compete
20 in the area of hospice care for the counties where Great
21 Lakes has Medicare certification, a reasonable restraint
22 on trade and a protectable business interest.

23 Again, like going back to Follmer and Footnote
24 15, you can't use the confidential information to undercut
25 the employer who had taken the employee into, into their

1 confidence, that amounts to a virtual stab in the back and
2 gives the competitor an unfair advantage and is
3 inconsistent with our principles of fair play.

4 So, I do not find the Non-Compete for that
5 reason to be unenforceable. Now, there are maybe some,
6 there is some fine tuning that could be done on it and I
7 may agree with some of the things that the defendants
8 point out. They say that the line of business restriction
9 is unreasonable. The contract prohibits employment for any
10 entity that provides home health care or hospice care. And
11 defendant argues that it should be narrowed to hospice
12 care only. I agree. Even though the plaintiff says that
13 Ms. Van Deusen sold home health care, hospice and
14 palliative care. The deposition testimony doesn't really
15 support that. The plaintiff directs me to Ms. Van Deusen's
16 deposition at page 35. But, she says she never sold home
17 health care. She says and I'm not sure I know what this
18 means, but she says she "gathered the information and sent
19 it in." And then she says but she never sold home health
20 care services. And so, for that reason, I think it does
21 have to be narrowed and also, palliative care wasn't even
22 sold by the plaintiff at the time of Ms. Van Deusen's
23 separation. So, I think it has to be further narrowed as
24 well. I agree again with the defendant that it should be
25 narrowed to hospice care only.

1 And finally, the defendants say that the
2 duration is unreasonable. The duration of two years is not
3 unreasonable. There's many reported decisions holding that
4 two years on a Non-Compete is not unreasonable. I, I won't
5 just rely on that though. I think it probably has to be
6 judged against the facts of the particular case. And here,
7 given the testimony about the development of relationships
8 with referral sources and the evolving into a preferred or
9 an exclusive provider, two years is not unreasonable.

10 And then, the tortious interference, a jury
11 could find that Ms. Van Deusen breached the contract.
12 Therefore, the defendants aren't entitled to summary
13 disposition on the tortious interference. And I, but I
14 cannot find, I also cannot find as a matter of law, that
15 Careline made an unjustified instigation of a breach of
16 contract because the jury has to decide if there was a
17 breach. And even if there was, whether Careline
18 unjustifiably instigated it.

19 As to the civil conspiracy, the defendant says
20 Ms. Van Deusen can't conspire to breach her own contract.
21 The plaintiff says that the claim is against the three
22 Careline entities. If memory serves me correctly, it
23 actually is against all defendants. But, I'll take what
24 the plaintiff says as a cure on that issue about breaching
25 your own--, or conspiring to breach your own contract.

1 With respect to unjust enrichment, an implied contract
2 claim can only made where there's no expressed contract.
3 There is an expressed contract here. There is no basis
4 for an unjust enrichment claim. And then, the contractual
5 attorney fees is just simply premature given that the
6 breach of contract claim has to be decided by a jury.

7 So, I'm denying the plaintiffs Motion for
8 Partial Summary Disposition. I'm denying the defendants
9 Motion for Summary Disposition except with respect to the
10 things that I've mentioned. I guess that would be the,
11 there's no unjust enrichment claim and I am narrowing the
12 scope of the Non-Compete to comply with the law. And I
13 will need someone to volunteer to submit an order that
14 reflects 'for the reasons stated on the record'.

15 MR. BEER: I will volunteer, your Honor. I was
16 taking extensive notes.

17 THE COURT: Great. Thank you. And in case you
18 forget, I livestreamed it on my Youtube channel and I
19 leave those recordings up so you can review.

20 MR. DAVIS: Thank you, your Honor.

21 THE COURT: Thank you. And that will conclude
22 this hearing.

23 MR. BEER: Thank you, your Honor.

24 (Hearing concludes at 3:20 PM)
25

1 STATE OF MICHIGAN)

2)

3 COUNTY OF INGHAM)

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10 I certify that that this transcript, consisting of 59
11 pages, is a complete, true, and correct transcript of the
12 proceedings and testimony taken in this case on Wednesday,
13 July 14, 2021.

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16 August 6, 2021

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